ECORD
AND
BRIEF

FILED
DEC 2 - 2016
OFFICE OF THE CLERK

No. 16-309

IN THE
Supreme Court of the United States

DIVNA MASLENJAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

CHRISTOPHER LANDAU, P.C.
Counsel of Record
PATRICK HANEY
JEFF NYE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

December 2, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

INTRODUCTION 1

REASON FOR GRANTING THE WRIT 1

The Sixth Circuit Erred By Holding, In Direct Conflict With The First, Fourth, Seventh, And Ninth Circuits, That A Naturalized American Citizen Can Be Stripped Of Her Citizenship In A Criminal Proceeding Based On An Immaterial False Statement. 1

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Harris v. Viegelahn,
135 S. Ct. 1829 (2015) 3

Hedgpeth v. Pulido,
555 U.S. 57 (2008) (*per curiam*) 8

Henderson v. United States,
135 S. Ct. 1780 (2015) 5

Kungys v. United States,
485 U.S. 759 (1988).....4, 8, 9

Ortiz v. Jordan,
562 U.S. 180 (2011).....5

Skilling v. United States,
561 U.S. 358 (2010).....8, 10

United States v. Agunbiade,
No. 98-4581, 172 F.3d 864, 1999 WL 26937
(4th Cir. Jan. 25, 1999) (*per curiam*) 5

United States v. Aladekoba,
61 F. App'x 27 (4th Cir. 2003) (*per curiam*).....5

United States v. Alferahin,
433 F.3d 1148 (9th Cir. 2006) 1, 4, 8

United States v. Al-Kadumi,
__ F. App'x __, 2016 WL 4916935
(6th Cir. Sept. 15, 2016) 2

United States v. Latchin,
554 F.3d 709 (7th Cir. 2009) 3, 4

United States v. Munyenyezi,
781 F.3d 532 (1st Cir. 2015).....4

United States v. Neder,
527 U.S. 1 (1999) 8

United States v. Nguyen,
829 F.3d 907 (8th Cir. 2016) 2

United States v. Puerta,
982 F.2d 1297 (9th Cir. 1992) 1, 5

Voisine v. United States,
136 S. Ct. 2272 (2016) 3

Walton v. Arizona,
497 U.S. 639 (1990) 2

Yates v. United States,
354 U.S. 298 (1957) 8

Statutes

8 U.S.C. § 1427(a)(3) 7

8 U.S.C. § 1451(e) 4

18 U.S.C. § 1001(a) 3, 5

18 U.S.C. § 1015 7

18 U.S.C. § 1015(a) 7

18 U.S.C. § 1425(a) 1, 2, 3, 4, 5, 6, 7, 8

INTRODUCTION

The brief in opposition only confirms that this Court's review is warranted. The United States concedes, as it must, that the Sixth Circuit's decision below is "inconsistent" with the Ninth Circuit's decisions in *United States v. Puerta*, 982 F.2d 1297, 1301 (9th Cir. 1992), and *United States v. Alferahin*, 433 F.3d 1148, 1155 (9th Cir. 2006). Opp. 16; *see also id.* at 8, 15. Nonetheless, the United States opposes review by arguing that (1) the conflict is "far shallower than petitioner suggests," *id.* at 8; (2) the decision below is correct on the merits, *see id.* at 8-15; and (3) this case is a "poor vehicle" to resolve the conflict, *id.* at 18. The United States is wrong on all three grounds.

REASON FOR GRANTING THE WRIT

The Sixth Circuit Erred By Holding, In Direct Conflict With The First, Fourth, Seventh, And Ninth Circuits, That A Naturalized American Citizen Can Be Stripped Of Her Citizenship In A Criminal Proceeding Based On An Immaterial False Statement.

This Court's review is warranted because the federal courts of appeals are concededly divided on an important and recurring question of federal law: whether a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement. The Sixth Circuit held below that "proof of materiality is *not* required to establish a violation of 18 U.S.C. § 1425(a)," Pet. App. 18a (emphasis added), while the Ninth Circuit has held precisely the opposite, *see Alferahin*, 433 F.3d at 1155; *Puerta*, 982 F.2d at 1301. The Sixth Circuit acknowledged the conflict,

but simply dismissed the contrary authorities as "unpersuasive." Pet. App. 9a, 22a. One member of the panel concurred "with some reluctance" because "[i]nitially, [she] was not inclined to differ from our sister circuits' interpretation of 18 U.S.C. § 1425(a)." Pet. App. 39a (Gibbons, J., concurring). The Sixth Circuit has subsequently confirmed that it "expressly rejected" the Ninth Circuit's approach in this case, *United States v. Al-Kadumi*, __ F. App'x __, 2016 WL 4916935, at *4 (6th Cir. Sept. 15, 2016), and the Eighth Circuit has noted, but not taken sides on, this circuit conflict, *see United States v. Nguyen*, 829 F.3d 907, 916-17 (8th Cir. 2016).

It is with substantial understatement, then, that the United States says that "some disagreement exists among the courts of appeals" on this issue, Opp. 8; that is rather like saying that there was "some disagreement" between "the Allies and the Axis Powers in World War II." *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment). Different federal courts of appeals have adopted diametrically opposed interpretations of the same federal criminal statute. Had petitioner been convicted in San Francisco, her conviction would have been reversed; because she was convicted in Youngstown, her conviction was affirmed, her citizenship was revoked, and she has now been deported.

Rather than disputing the conflict between the Sixth and Ninth Circuits, the United States argues that "[t]he conflict is not widespread," Opp. 16, and attempts to distinguish cases from the First, Fourth, and Seventh Circuits that follow the Ninth Circuit's lead, *see id.* at 16-17. As a threshold matter, that

argument misses the point: even if the conflict were limited to the Sixth and Ninth Circuits, it is sufficiently stark and intractable to warrant this Court's review. Those two circuits, after all, are home to almost a *third* of the Nation's population, and a disproportionate share of immigration cases. The issue presented here arises repeatedly in those circuits (and elsewhere), and the conflicting positions have been thoroughly and definitively spelled out in the conflicting decisions. Accordingly, granting review here would not be "premature," Opp. 17; to the contrary, there is no reason to allow this acknowledged circuit conflict to fester. *Cf. Voisine v. United States*, 136 S. Ct. 2272, 2278 n.2 (2016) (certiorari granted to resolve conflict between First and Ninth Circuits); *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (certiorari granted to resolve "acknowledged" conflict between two circuits).

In any event, the United States' efforts to distinguish the cases from other circuits following the Ninth Circuit's lead are unavailing. The United States attempts to distinguish *United States v. Latchin*, 554 F.3d 709 (7th Cir. 2009), on the ground that "the parties *agreed* that a false statement has to be material to sustain a conviction under Section 1425(a) based on a predicate violation of Section 1001(a)," which contains its own materiality requirement. Opp. 17 (emphasis added; brackets and internal quotation omitted). But even cursory review of that decision shows that the parties there agreed that "the crime of *procuring citizenship* through false statements"—*i.e.*, the § 1425(a) crime—contains a materiality requirement. *Latchin*, 554 F.3d at 712 (emphasis added). And the Seventh Circuit affirmatively "agree[d]" with the parties on

this score, noting that "the civil and criminal [denaturalization] statutes [*i.e.*, 8 U.S.C. § 1451(e) and 18 U.S.C. § 1425(a)] both require a material misrepresentation." *Id.* at 713 n.3; *see also id.* at 715 ("[A] conviction under § 1425(a) requires proof of ... materiality .... We are not alone in this view.") (citing *Alferahin*, 433 F.3d at 1155). And the fact that the Government itself has previously conceded the issue (a point the United States never acknowledges, much less seeks to explain, in its brief) only confirms the need for this Court's review. *See* Pet. App. 25a (noting that the Government "has taken a contrary position on the materiality issue in different cases before different courts"); *id.* at 39a (Gibbons, J., concurring) ("The government's inconsistency in this case and on this issue is puzzling and indeed inappropriate.").

The United States' efforts to distinguish *United States v. Munyenyezi*, 781 F.3d 532 (1st Cir. 2015), are similarly meritless. In that case, according to the United States, "the materiality element was not contested on appeal because the defendant conceded that her 'statements were knowingly made and material.'" Opp. 16-17 (quoting 781 F.3d at 538 n.6). But the First Circuit did not base its materiality holding on any such concession: to the contrary, the First Circuit held that, "*according to our judicial superiors*—there are 'four independent requirements' for a section 1425(a) crime," including that "'the naturalized citizen must have misrepresented or concealed some fact,'" and "'the fact must have been material.'" *Munyenyezi*, 781 F.3d at 536 (quoting *Kungys v. United States*, 485 U.S. 759, 767 (1988)) (emphasis added). As in *Latchin*, the reason that "the materiality element was not contested on

appeal," Opp. 16, is that the *Government* never challenged the existence of that element; the defendant certainly had no incentive to contest the point.

Finally, the United States errs by denying that the Fourth Circuit in *United States v. Aladekoba*, 61 F. App'x 27 (4th Cir. 2003) (*per curiam*), "joined the Ninth Circuit in requiring proof of materiality for a conviction under Section 1425(a)." Opp. 16. In that case, the Fourth Circuit held that the statements underlying a § 1425(a) conviction "must be material in order to be contrary to law." 61 F. App'x at 28 (citing *Puerta*, 982 F.2d at 1301). The United States' insistence that "the Section 1425(a) conviction in that case was also premised on the defendant's false statements in violation of Section 1001(a)," Opp. 17, misses the point: as the citation to *Puerta* underscores, the Fourth Circuit derived the materiality element from § 1425(a) itself, not from the predicate § 1001(a) crime, *see Aladekoba*, 61 F. App'x at 28; *see also United States v. Agunbiade*, No. 98-4581, 172 F.3d 864, 1999 WL 26937, at *2 (4th Cir. Jan. 25, 1999) (*per curiam*). And insofar as the United States asserts that "an unpublished decision [can] not create a circuit conflict," Opp. 17, that assertion is mystifying: this Court routinely grants certiorari to review circuit conflicts involving unpublished decisions. *See, e.g.*, *Henderson v. United States*, 135 S. Ct. 1780, 1784 & n.2 (2015); *Ortiz v. Jordan*, 562 U.S. 180, 183-84 & n.1 (2011).

Because the United States cannot deny the circuit conflict presented here, it devotes the bulk of its brief to arguing that the decision below is correct on the merits. *See* Opp. 8-15. Needless to say, that

argument misses the point: for present purposes, the question is whether this Court should resolve the conflict, not which side of the conflict should prevail.

In any event, the United States is wrong on the merits. The United States caricatures petitioner's position as being that "reliance on the plain text of Section 1425(a) 'is an overly simplistic approach to statutory interpretation.'" Opp. 9 (quoting Pet. 16). But petitioner said nothing of the sort; to the contrary, petitioner's argument is based on the statute's text, which authorizes conviction only insofar as a defendant "knowingly procures or attempts to procure" naturalization contrary to law. 18 U.S.C. § 1425(a). Not any and every underlying violation of law will trigger that provision, but only an underlying violation for the purpose of "procuring" naturalization. *See* Pet. 16-17. The United States never explains how an *immaterial* false statement can satisfy the statutory procurement requirement. *Cf.* Pet. App. 39a (Gibbons, J., concurring) ("[T]he government, in response to questioning at oral argument, was unable to articulate any interest of the United States in prosecuting statements that are immaterial.").

Indeed, the district court here read the procurement requirement out of the statute altogether. The court instructed the jury that the requirement is satisfied if the government "prove[s] that defendant obtained United States citizenship." Pet. App. 85a. Although the court proceeded to instruct the jury that the government also "must prove that defendant acted in violation of at least one law governing naturalization," *id.*, the court never instructed the jury that the Government must prove

a *link* between the violation and the naturalization—*i.e.*, procurement. To the contrary, by instructing jurors that they could convict petitioner "[e]ven if you find that a false statement *did not influence* the decision to approve [her] naturalization," *id.* at 86a (emphasis added), the court affirmatively *negated* the statutory procurement requirement.

The United States has no response to any of this other than to assert that petitioner "cites no authority establishing in this context that 'procure' inherently requires a material false statement or, indeed, a false statement at all." Opp. 9. But that assertion misses the point: where, as here, the predicate violation is a false statement, the United States must prove that the statement is material in order to satisfy the procurement requirement: by definition, an immaterial statement that "did not influence" a naturalization decision, Pet. App. 86a, cannot have "procured" that decision.

The United States similarly errs by challenging petitioner's alternative argument "that her conviction 'cannot stand because § 1015(a)—a predicate offense for the § 1425(a) violation in this case—also requires a material false statement." Opp. 10 (quoting Pet. 22). According to the United States, this alternative argument establishes at most a harmless error, because "the jury was instructed on *two* predicate offenses: Section 1015 and 8 U.S.C. § 1427(a)(3)." *Id.* (emphasis in original).

The jury here, however, returned a *general* verdict that did not specify whether petitioner's conviction on Count I was based on the § 1015 or § 1427(a)(3) predicate offense (or both). *See* Pet. App. 91-92a. Accordingly, it follows that petitioner's conviction is

legally invalid if *either* of the alternative theories of guilt is legally invalid. *See, e.g., Skilling v. United States*, 561 U.S. 358, 414 (2010); *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (*per curiam*); *Yates v. United States*, 354 U.S. 298, 312 (1957). To be sure, as the Government notes, "error on one alternative theory of guilt *may* be harmless," Opp. 11 (emphasis added; citing *Skilling*, 561 U.S. at 414), but the mere availability of harmless-error review hardly excuses the Government from having to defend against an alleged legal error in the first place.

That point leads directly to the United States' final, and equally unavailing, argument against review: that "this case is a poor vehicle to address whether proof of materiality is required for a conviction under Section 1425(a) because petitioner's misstatements to immigration officials plainly were material." Opp. 16. That argument is based on both an unwarranted assumption about the law and a distorted depiction of the record.

The United States assumes that the appropriate standard for materiality under § 1425(a) is the standard set forth in *United States v. Neder*, 527 U.S. 1, 16 (1999) ("In general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it is addressed.") (internal quotation omitted). But *Neder* did not involve § 1425(a), and the Ninth Circuit has held that its general materiality standard does not apply in the specific § 1425(a) context. *See Alferahin*, 433 F.3d at 1155 ("Building on *Kungys*, we held in *Puerta* that the prohibition under 18 U.S.C. § 1425(a) on the procurement of citizenship 'contrary to law'

incorporated not only a requirement of materiality, but the unique definition of materiality articulated in Justice Brennan's controlling opinion in *Kungys*.").

In any event, the United States' harmless-error argument is based on a wholly one-sided and misleading depiction of the record. The United States baldly asserts, as if it were an undisputed fact, that petitioner and her family feared persecution in Bosnia, and thus sought refugee status, "*because* her husband ... did not serve in the Bosnian Serb army during the civil war." *Id.* at 2 (emphasis added); *see also id.* at 18 (same). The United States further asserts that petitioner and her family were granted refugee status in the United States "[b]ased on those representations." *Id.* at 2.

But, as explained in the petition, that is the heart of the controversy here. Notwithstanding the United States' assertions, the record contains ample evidence that petitioner and her family sought and obtained refugee status because they feared ethnic persecution by Muslims in Bosnia. Indeed, the immigration official who interviewed petitioner and her family in 1998 testified below that the basis for petitioner's claim of refugee status for her family was that "because they were ethnic Serbs, they had been forced to flee their home—the place that they lived in Bosnia, and that they were not able to go back because they feared, basically, for their life, which was plausible." Pet. App. 56a; *see also id.* at 57a ("[T]hey said that they were threatened and forced to leave because of their ethnicity ... because Muslims forced them out."); *id.* at 58a (noting "their fear that they would be mistreated on account of their ethnicity if they returned back to their home"); *id.*

("[They] left because they were threatened by the ethnic Muslims, and ... people were shooting at their home, ... [and] they were told to leave or else they would be harmed."); *id.* at 64a (Trial Exhibit 26) (stating that petitioner and her family "fear maltreatment on account of their ethnicity if they return to their home village").

The jury understood that the nub of the factual dispute here was the basis for petitioner's claim of refugee status. Thus, during deliberations, the jury sent the court a note asking "What was [petitioner's] refugee status granted on? Fear of not serving? Or fear of ethnic backlash[?]" *Id.* at 90a. The court answered that question by telling the jurors that those were questions for them to decide: "You must make your decision based only on the evidence you saw and heard here in court. ... You may also rely on your collective memories. ... You have now what you need to decide the case." *Id.* at 89a. There is no way of telling from the general verdict in this case how the jurors ultimately decided that issue, or whether they decided it at all; the jury instructions and the verdict form certainly did not require them to do so. *See* Pet. App. 83-89a, 91-92a.

This Court should not allow the United States to evade review of the circuit conflict presented here based on a preemptive harmless-error argument that rests on an unwarranted assumption about the law and a one-sided and misleading depiction of the evidence. If this Court were to grant review and rule in petitioner's favor, the United States would be entitled to pursue its harmless-error argument on remand. *See, e.g.*, *Skilling*, 561 U.S. at 414. But, as noted above, the availability of such an argument

does not excuse the Government from having to defend against an alleged legal error in the first place. *See id.*

The bottom line here is that the United States does not, and cannot, deny that the circuits are divided on an important and recurring question of federal law squarely presented here. Indeed, the United States does not, and cannot, deny that the United States itself has taken inconsistent positions on the issue presented here—including in this very case. *See* Pet. App. 25-26a. Accordingly, this Court should grant review.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant certiorari.

December 2, 2016

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
PATRICK HANEY
JEFF NYE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com